

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

AUTO F. BOZARTH)	
Claimant)	
VS.)	
)	Docket No. 265,670
BOB BERGKAMP CONSTRUCTION CO., INC.)	
Respondent)	
AND)	
)	
ZURICH INSURANCE)	
Insurance Carrier)	

ORDER

Claimant appeals Administrative Law Judge John D. Clark's May 30, 2002, preliminary hearing Order.

ISSUES

This is a claim for an initial February 12, 1999, work-related accident and then a series of accidents occurring each and every day due to claimant's work activities while working for the respondent through the present. Claimant's preliminary hearing benefit request is medical treatment for a degenerative arthritic condition in both of his knees aggravated and made worse from the initial accident and his everyday work activities. The Administrative Law Judge (ALJ) denied claimant's request for medical treatment finding the claim time barred for failure to serve upon the respondent a timely written claim for workers compensation benefits.

Claimant contends the ALJ erred and requests the Appeals Board (Board) to reverse the preliminary hearing Order and award him the requested workers compensation benefits. Claimant argues he proved through his testimony and the medical reports admitted into the preliminary hearing record that he initially aggravated a preexisting severe arthritic condition in his knees and continues to aggravate the condition each and every day that he works for the respondent. Accordingly, claimant argues, because he continues to work and suffer further injury to his knees, the written claim served on respondent in a letter dated May 1, 2001, and filed with Division of Workers Compensation on May 16, 2001, was timely.

Conversely, respondent requests the Board to affirm the preliminary hearing Order. Respondent argues claimant's current need for medical treatment is the result of his preexisting severe arthritic condition in both of his knees and is not the result of a work-

related accident. In the alternative, respondent argues that claimant's knees became symptomatic in an initial February 1999 incident at work and claimant's claim for workers compensation benefits is time barred because claimant failed to serve upon the respondent a timely written claim for compensation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the parties' briefs, the Board makes the following findings and conclusions:

In order to fully understand this case, the Board finds it necessary to summarize the procedural history of the case:

(1) In a letter dated May 1, 2001, claimant's attorney sends respondent a written claim for compensation.

(2) On May 16, 2001, claimant files with the Division of Workers Compensation an Application for Hearing and an Application for Preliminary Hearing.

(3) On May 21, 2001, respondent takes claimant's discovery deposition.

(4) On June 14, 2001, a preliminary hearing was scheduled before the ALJ, but no transcript of the hearing and no testimony was taken. However, an agreed order dated June 14, 2001, signed by the ALJ was entered with respondent agreeing to reimburse claimant for some outstanding medical expenses and medical mileage. Additionally, Kenneth A. Jansson, M.D. was appointed to perform an independent medical examination of claimant.

(5) After Dr. Jansson examined claimant on August 15, 2001, a preliminary hearing was held before the ALJ on September 27, 2001. Claimant's preliminary hearing benefit request was medical treatment for bilateral knee replacements. Claimant testified briefly and Dr. Jansson's August 15, 2001, independent medical examination report and an additional medical examination report of John R. Schurman, II, M.D. were admitted into the preliminary hearing record.

(6) In a September 28, 2001, preliminary hearing Order the ALJ denied claimant's request for medical treatment. The ALJ found that as a result of Dr. Jansson's medical report claimant's bilateral knee problems were not work-related. Moreover, Dr. Schurman only opined that claimant's work may have aggravated his preexisting arthritic condition. The ALJ concluded claimant failed to prove his bilateral knee problems were caused by his work with respondent. Claimant did not appeal this order to the Board.

(7) On January 3, 2002, another preliminary hearing was held. No testimony was taken but claimant offered and the ALJ admitted into the preliminary hearing record the October 9, 2001, medical report of retired orthopedic surgeon C. Reiff Brown, M.D. Dr. Brown, at the request of claimant's attorney, examined and evaluated claimant on October 9, 2001.

(8) In a preliminary hearing Order dated January 3, 2002, the ALJ again found claimant failed to prove he suffered a work-related injury. Additionally, the ALJ found Dr. Brown's medical report only related to a specific aggravation occurring on February 12, 1999. The ALJ concluded for that accident date the claim was time barred.

(9) Claimant timely appealed the January 3, 2002, preliminary hearing Order to the Board. In a February 21, 2002, Order, the Board affirmed the ALJ's preliminary hearing Order.

This brings us to the subject May 30, 2002, preliminary hearing and the preliminary hearing Order of the same date. At the May 30, 2002, preliminary hearing, claimant offered and the ALJ admitted into the preliminary hearing record the following medical reports:

- (1) March 11, 2002, medical report from C. Reiff Brown, M.D.
- (2) March 12, 2002, medical report from Steen E. Mortensen, M.D.
- (3) April 10, 2002, medical report from orthopedic surgeon John R. Schurman, M.D.
- (4) April 30, 2002, medical report from claimant's family physician Richard H. Egelhof, M.D.

No additional testimony was given at the May 30, 2002, preliminary hearing and the only new evidence admitted were the foregoing medical reports.

The ALJ entered the preliminary hearing Order that is the subject of this appeal on May 30, 2002, and again denied that claimant's request for preliminary hearing benefits because claimant's injuries were time barred.

Because the foregoing medical reports are the only new evidence admitted into the preliminary hearing record since the Board entered its Order on February 21, 2002, the Board finds it is not necessary to repeat those findings and conclusions in this Order. The Board adopts those findings and conclusions as if specifically set forth herein.

The medical reports admitted at the May 30, 2002 preliminary hearing are summarized as follows: The first report is Dr. Brown's and he opines that after further review of claimant's medical file, claimant's work activities after his February 12, 1999,

injury, produced progressive pain in claimant's right knee as well as his left knee. The second is Dr. Mortensen's report who opines that claimant's knee pain is aggravated by daily activities including his work activities. The third medical report is from Dr. Schurman. Dr. Schurman specifically relates claimant's worsening and exacerbated knee symptoms to the heavy lifting and the working episode where claimant was required to use the sledge hammer. The last report is from Dr. Egelhof who is claimant's family physician. Dr. Egelhof described claimant's sledge hammer incident at work in 1999 and opines that incident started claimant's pain and discomfort in his knees. Dr. Egelhof further opines that claimant's preexisting osteoarthritis bilateral knee condition has been aggravated by claimant's work.

Independent medical examiner Dr. Jansson's opinion remains unchanged that claimant's current bilateral knee condition and current need for bilateral knee replacement is not the result of a work injury. Instead the cause is claimant's severe preexisting degenerative osteoarthritis.

The Board finds Dr. Jansson's and Dr. Schurman's medical opinions, at this point in the litigation, the most persuasive opinions because they are the result of independent medical examinations. Based on those opinions, the Board finds, because of claimant's preexisting severe degenerative arthritic conditions in both of his knees, it is questionable whether claimant's work activities have any relationship to claimant's need for knee replacements. Dr. Schurman's April 10, 2002, medical report, however, specifically relates an aggravation or an otherwise exacerbation of symptoms to the sledge hammer incident at work. Claimant alleges that incident occurred on February 12, 1999. Claimant, however, did not serve a written claim for compensation upon the respondent as required until May 2001 more than 2 years after the alleged February 1999, accident which is clearly outside the 200 day time limit from date of accident or the one year limit if the employer failed to file an accident report.¹

As provided by the Workers Compensation Act, preliminary hearing findings are not binding but subject to modification upon a full hearing of the claim.²

WHEREFORE, the Board affirms ALJ John D. Clark's May 30, 2002, preliminary hearing Order.

IT IS SO ORDERED.

Dated this ____ day of October 2002.

¹ See K.S.A. 44-520a (Furse 1993) and K.S.A. 44-557(c) (Furse 1993).

² See K.S.A. 1998 Supp. 44-534a(a)(2).

BOARD MEMBER

- c: Chris A. Clements, Attorney for Claimant
Wade Dorothy, Attorney for Respondent
John D. Clark, Administrative Law Judge
Director, Division of Workers Compensation